

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re RICHARD E., et al., Persons  
Coming Under the Juvenile Court Law.

B150138

(Super. Ct. No. J974699)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MANUEL E.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County,  
Emily Stevens, Judge. Reversed and remanded.

Michael A. Salazar, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Lloyd W. Pellman, County Counsel, and Lois D. Timnick, Deputy County  
Counsel, for Plaintiff and Respondent.

\_\_\_\_\_

Appellant Manuel E. challenges the juvenile court's order under Welfare and Institutions Code section 366.26<sup>1</sup> terminating his parental rights concerning his children, Richard E., Jessica E., and Linda E. He contends that he was denied proper notice of numerous dependency hearings and representation of counsel during these hearings, and that he otherwise received ineffective assistance of counsel.

Our review discloses that for a three-year period after Manuel's children were placed in long-term foster care, respondent Los Angeles County Department of Children and Family Services (DCFS) failed to give notice of review hearings to Manuel. During this period, Manuel alleges the children's foster parent denied him visitation with the children. DCFS also did not give Manuel notice of the hearing at which the juvenile court ordered a section 366.26 hearing, or inform him of his right to challenge this order. Throughout this period, Manuel's appointed counsel never attended any hearing, and Manuel himself did not appear at a hearing.

We conclude that these failures regarding notice and representation amount to a fundamental breakdown in the protections accorded parents under the dependency statutes, and thereby denied Manuel due process regarding the termination of his parental rights, which rested on the juvenile court's determination he had not demonstrated a relationship with his children through visitation. We therefore reverse.

---

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

## FACTUAL AND PROCEDURAL BACKGROUND

Manuel and Georgette R.<sup>2</sup> are the natural parents of eight children who have been the subject of dependency proceedings. This appeal concerns Richard, Jessica, and Linda, the three youngest children, who were born, respectively, in 1989, 1991, and 1992.

### *A. Placement of the Children in Long-Term Foster Care*

On September 3, 1991, the DCFS filed a petition under section 300 on behalf of Richard and Jessica. The petition alleged that Jessica had been born with a positive toxicology screen for opiates, that Manuel had a history of drug abuse, and that Richard and Jessica's siblings were dependents of the juvenile court.

Manuel appeared at the detention hearing on September 4, 1991, and Melvin Frumes was appointed his counsel. At this hearing, the juvenile court detained the children in the home of Augustina R., the maternal grandmother.

On October 2, 1991, Jessica and Richard were declared dependents of the juvenile court, and the parents were accorded monitored visitation. Manuel appeared at the pertinent hearing, represented by Frumes.

On July 16, 1992, DCFS filed a section 300 petition on behalf of Linda, alleging, inter alia, that she had been born with a positive toxicology screen for opiates, and that her parents had a history of heroin use. The juvenile court initially ordered Linda detained. Neither Manuel nor Frumes appeared at the detention hearing.

Represented by Frumes, Manuel appeared at subsequent hearings concerning the three children, including a combined hearing held on August 11, 1992. At that

---

<sup>2</sup> Georgette is not a party to this appeal.

hearing, Linda was declared a dependent of the juvenile court, and Manuel was granted monitored visitation. The juvenile court also held a permanent planning hearing regarding Jessica and Richard. It found that Manuel and Georgette had not complied with the case plan, and ordered that Jessica and Richard be placed in a permanent plan of long-term foster care with Augustina. Manuel agreed with the order regarding long-term foster care.

During the hearing, Frumes requested that he be relieved as Manuel's counsel, and that Manuel should be appointed new counsel for the next hearing. The juvenile court declined to relieve Frumes immediately because "Mr. Blume," the alternative attorney, was not then present, and a check for conflicts was necessary. Frumes offered to tell Blume about the case and hand over his files.

Blume appeared near the end of the hearing. The juvenile court informed Blume about a hearing set for September 1, 1992, regarding an older sibling of the three children in question, and introduced him to Manuel. Frumes stated to the court: "I'll explain to Mr. Blume."

Manuel and Frumes were both sent notice of the next pertinent hearing regarding the three children, which occurred on February 9, 1993, but neither he nor his counsel appeared. The juvenile court concluded that Richard and Jessica were properly placed in long-term foster care, and it set a permanency planning hearing on August 10, 1993, for Linda.

Only Manuel was sent notice of the August 10, 1993 hearing, and neither he, Frumes, nor Blume appeared. The juvenile court found that Manuel and Georgette had not participated in court-ordered treatment programs, and their whereabouts had been unknown for substantial times during the reunification period. It ordered that Linda be placed in a permanent plan of long-term foster care with Augustina, whom it stated was "taking wonderful care" of the children.

### *B. Review Hearings Until May 1995*

Neither Manuel nor appointed counsel appeared at any hearings for several years. The record also indicates that Manuel was not given notice of many of these hearings.

There is no evidence that Manuel was sent notice of three review hearings held in early 1994. He was subsequently sent notice of review hearings in April and November 1994, but not of an intervening hearing in May 1994. Until April 1994, DCFS reported that Manuel's whereabouts were unknown, and it stated that it had engaged in a due diligence search. In November 1994, DCFS indicated that Manuel's whereabouts remained unknown, but that he received mail at a specific address, and he had sporadic contact with the children.

Manuel was sent notice of a review hearing set for May 22, 1995. In connection with this hearing, DCFS reported that he was incarcerated in a Los Angeles County jail. The juvenile court issued an order for Manuel to be transported from jail to a hearing on May 22, 1995, but he did not appear at the hearing.

### *C. Review Hearings Following May 1995 and Setting of Section 366.26 Hearing*

Manuel was given notice of a review hearing in November 1995, but thereafter, he was not sent notice of a hearing for approximately three years. He was not given notice of review hearings in May and November 1996, even though DCFS was aware that he was incarcerated in state prison. In connection with a review hearing in May 1997, DCFS reported that Manuel's whereabouts were again unknown. He was not sent notice of the May 1997 hearing, or of the subsequent review hearings in November 1997 or May 1998. After this lengthy hiatus in notice,

Manuel was sent notice of a review hearing in November 1998, and DCFS submitted a partial due diligence report indicating its efforts to locate him.

At a review hearing in May 1999, DCFS recommended that the permanent plan for the children should be changed, parental rights should be terminated, and the children should be adopted by Augustina. DCFS submitted a declaration of due diligence regarding Manuel, but there is no indication that Manuel was otherwise given notice of this hearing. The juvenile court ordered a hearing under section 366.26.

The section 366.26 hearing was set and continued several times. In November 1999, DCFS submitted a declaration of due diligence regarding Manuel, but Manuel was not given notice of the dates set for the hearings in November 1999 and May 2000.

In May 2000, the juvenile court informed DCFS that it would consider imposing sanctions if proper notice was not given regarding the hearing, then continued to September 6, 2000. The juvenile court remarked: “[I]t is very frustrating to have to continue these cases over and over again all day long because [DCFS] can’t get its act together.” DCFS sought and obtained an order permitting notice by publication to Manuel of the section 366.26 hearing on the strength of the due diligence search conducted in early 1999.

In September 2000, DCFS refiled its declaration of due diligence regarding its efforts to locate Manuel in early 1999, and submitted evidence that it had given notice of the section 366.26 hearing by publication. On September 6, 2000, the juvenile court concluded that proper notice had not been given, set the section 366.26 hearing for January 12, 2001, and directed DCFS to submit all requisite documents, including a new declaration of due diligence, or face sanctions.

DCFS subsequently determined that Manuel was incarcerated and gave him notice of the pending hearing. Manuel declined to waive his appearance at the hearing. On January 12, 2001, the juvenile court appointed Jennifer Kimball to represent Manuel. Manuel, who had been transported to the courthouse, refused to enter the courtroom. The juvenile court concluded that DCFS had not given proper notice to Georgette, continued the hearing to May 10, 2001, and ordered DCFS to pay sanctions of \$500.

#### *D. Section 366.26 Hearing*

In a letter received on May 3, 2001, Manuel informed the juvenile court that he opposed termination of his parental rights and adoption of the children. According to the letter, Augustina had denied him visitation for four years, and he believed that adoption would give her “rights that she would without any doubts take total advantage of.” The letter stated: “Judge, at this time I know long term foster care is the answer! So I may have some rights in there lifes [*sic*].”

Manuel appeared at the section 366.26 hearing on May 10, 2001, and was represented by Kimball. Kimball directed the juvenile court to Manuel’s letter, which stated his opposition to the change of permanent plan. In response to the juvenile court’s questions about the history of the case, Kimball stated: “Your honor, I think this case came back. I believe this case must have been in a guardianship and was out of the system for a while and came back recently setting a .26 and we all got appointed. But I have no knowledge of the history of this case.”

Manuel addressed the juvenile court, informing it that he had been incarcerated for seven months, and would be released in three weeks. Manuel stated: “I just want the right to have rights to see my kids once in a while. That’s what I want. I know I’m not capable of supporting them right now, but I just want

the right to see them every now and then.” He reaffirmed that Augustina had denied him his court-ordered visitation rights with the children, and said, “There’s no way I could bond with them if she keeps the kids from me.”

The juvenile court asked Manuel why he had failed to come to court to complain about the denial of visitation. The following exchange then occurred:

“THE FATHER: *I wasn’t in touch.*

“THE COURT: You weren’t in touch?

“THE FATHER: No.

“THE COURT: With who?

“THE FATHER: *With the courts.* With the worker.

“MS. KIMBALL: Your honor, I asked my client if he recalls having previous counsel and who that might have been just to get an idea. *He doesn’t recall that. I don’t know if the file reflects that the father was ever represented.*” (Italics added.)

When the juvenile court asked why Manuel had not complained to the DCFS social worker about Augustina’s purported denial of his visitation rights, Manuel stated: “The worker went along with her. She agreed.”

The juvenile court terminated Manuel’s parental rights and ordered adoption as the permanent plan. In so ruling, the juvenile court stated: “In this case, the children have been with this caretaker for many, many years. There has been no contact with the parents. The father indicates that he would like to see the children but he has not made an effort to do that other than to accept what he claims is the grandmother’s refusal. In light of the fact that he has not seen them for five years, there is no exception that I can fall back on in order to come up with a different plan. There is no (c)(1)(A) exception.”

## DISCUSSION

Manuel contends that (1) he was denied due process and adequate representation of counsel regarding now final orders prior to the termination of his parental rights at the section 366.26 hearing, and (2) he received ineffective assistance of counsel at the section 366.26 hearing. Because our resolution of his first contention is dispositive on the matters before us, we do not address his second contention. As we explain below, DCFS's failure to give notice of numerous review hearings following the children's placement in long-term foster care, coupled with the failure of appointed counsel to appear at hearings, requires the reversal of the order terminating Manuel's parental rights and freeing them for adoption.

### *A. Notice and Right to Counsel*

We begin by observing that, given the importance of parental rights, due process mandates that in dependency proceedings, “the state, before depriving a parent of [his or her] interest, must afford him [or her] adequate notice and an opportunity to be heard.” (*In re B. G.* (1974) 11 Cal.3d 679, 688-689.) Thus, the dependency statutes “provide for early and complete notification to the parent of every stage of the proceedings during the entire course of the dependency.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1155.) Generally, “due process requires ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ [Citation.]” (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.)

In dependency proceedings, as in other actions, “[a] judgment is void for lack of jurisdiction of the person where there is no proper service of process on or

appearance by a party to the proceedings.” (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016.) However, as the court explained in *In re Melinda J.*, *supra*, 234 Cal.App.3d at pages 1418-1419, the lack of strict compliance with notice statutes in dependency proceedings, absent a showing of prejudice, does not render the subsequent proceedings void. In *Melinda J.*, the pertinent agency engaged in extensive efforts to find a transient mother, and sent notices to relatives of all proceedings, but failed on two occasions to send notices to the mother at her last known address, as required by section 366.21, subdivision (b). (234 Cal.App.3d at pp. 1418-1419.) The court in *Melinda J.* concluded that despite this error, the mother had received notice in compliance with due process, and the error could not be deemed prejudicial because she had had no fixed address when the notices were sent. (*Id.* at p. 1419.)

The dependency statutes also provide that indigent parents are entitled to appointment of counsel, as well as competent representation by counsel. (§§ 317, subd. (a), 317.5.) Once appointed, counsel must continue to represent the parent “unless relieved by the court upon the substitution of other counsel or for cause.” (§ 317, subd. (d).) By contrast, parents have no general right under the federal and state Constitutions to the assistance of appointed counsel in dependency proceedings, although such a right may arise when “in the estimation of ‘the court in which the matter is pending subject to appellate review,’ fundamental fairness requires such appointment.” (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1153, fn. 6, quoting *In re Sade C.* (1996) 13 Cal.4th 952, 986-987.)

However, as the court stated in *In re Meranda P.*, *supra*, 56 Cal.App.4th at pages 1152-1153: “Neither the absence nor the blunder of appointed counsel alone entitles the parent to obtain the appellate relief he or she seeks. With respect to a parent’s assertion of a violation of the statutory right to representation or

the statutory right to adequate representation, the parent must also show ‘it is “reasonably probable . . . a result more favorable to the appealing party would have been reached in the absence of the error.”’ [Citations.] With respect to a parent’s assertion of a violation of the constitutional right to counsel, the parent must also show there was a ‘determinative difference’ in the outcome of the proceeding by reason of the parent’s lack of counsel, such that the proceeding was rendered fundamentally unfair to the parent. [Citations.] With respect to a parent’s assertion of a violation of the constitutional right to competent counsel, we have not found any case law on the subject in the dependency context. However, in criminal cases a defendant who claims unconstitutionally inadequate representation must establish, in addition to the reasonable probability of a different outcome, that ‘counsel’s deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair.’ [Citations.]” (Fns. omitted.)

### B. *Waiver Rule*

Because Manuel challenges rulings that are now final, our inquiry into his contentions regarding inadequate notice and inadequate representation by counsel is governed by the so-called “waiver rule.” (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1151.) Generally, rulings by the juvenile court, with enumerated exceptions, are appealable. (*Id.* at pp. 1149-1150; § 395.) Thus, absent special circumstances, “an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order . . . .” (*Id.* at p. 1151; *In re Janee J.* (1999) 74 Cal.App.4th 198, 208.)

The waiver rule was first discussed at length in *Meranda P.* In that case, a section 300 petition was filed regarding a mother, who informed the juvenile court at

the detention hearing that she did not want counsel appointed for her, and subsequently, she was not represented during the first 12 months of the reunification period. (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1147.) Throughout much of this period, she failed to attend hearings and to comply with the reunification plan. (*Id.* at pp. 1147-1148.) After the 12-month review, she was represented by appointed counsel, and she appeared at the 18-month review, where she presented evidence that she was then willing to address the problems underlying the section 300 petition. (56 Cal.App.4th at p. 1148.) At a section 366.26 hearing, the juvenile court terminated her parental rights and found her child adoptable. (56 Cal.App.4th at p. 1149.)

On appeal, the mother contended that the termination order was infirm, arguing that she had been denied her rights to the representation of counsel and effective assistance of counsel at hearings prior to the section 366.26 hearing. (*In re Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1150, 1151.) The court in *Meranda P.* concluded that the waiver rule generally applies to dependency proceedings, noting that “there are significant safeguards built into this state’s dependency statutes which tend to work against the wrongful termination of a parent’s right to a child even though a parent may be unrepresented or poorly represented.” (*Id.* at p. 1154.) Applying the waiver rule, the court in *Meranda P.* rejected the mother’s contention, reasoning that she had declined the appointment of counsel at the detention hearing, and she had squandered repeated opportunities to raise her contention by appeal from the orders issued at the hearings prior to the section 366.26 hearing. (56 Cal.App.4th at pp. 1157-1158.) The *Meranda P.* court also rejected the mother’s request to deem her challenge as a collateral attack by writ of habeas corpus, citing subdivision (i) of section 366.26, which “forbids

alteration or revocation of an order terminating parental rights except by means of a direct appeal from the order.” (56 Cal.App.4th at p. 1161.)

Nonetheless, the waiver rule does not preclude all belated challenges to final orders. In *In re Cathina W.* (1998) 68 Cal.App.4th 716, 718-719, a section 300 petition was filed regarding a mother, and after 20 months of reunification services, the juvenile court set a hearing under section 366.26. The mother was not present when this hearing was set, and the clerk sent her an untimely and defective notice regarding her right to challenge the order setting the section 366.26 hearing by writ petition pursuant to California Rules of Court, rule 39.1B (rule 39.1B). (68 Cal.App.4th at pp. 722-723.) The mother did not file a rule 39.1B petition, but instead challenged the order setting the section 366.26 hearing in an appeal from the subsequent order terminating her parental rights. (68 Cal.App.4th at p. 718.)

Although the dependency statutes condition an attack by appeal on an order setting a section 366.26 hearing on the filing of a rule 39.1B petition (§ 366.26, subd. (l)(3)), the court in *Cathina W.* nonetheless addressed her challenge to this order. The *Cathina W.* court reasoned that the juvenile court, through no fault of the mother, failed to give her adequate notice of the requirements regarding a rule 39.1B petition.

The holdings in *Meranda P.* and *Cathina W.* were subsequently harmonized in *In re Janee J.*, *supra*, 74 Cal.App.4th 198. In *Janee J.*, the filing of a section 300 petition initiated proceedings regarding a mother who failed to appear at many hearings following the jurisdictional hearings, although she was represented by counsel at these hearings up to and including the section 366.26 hearing, at which her parental rights were terminated. (74 Cal.App.4th at pp. 202-204.) On appeal, she challenged numerous rulings made at hearings prior to the section 366.26

hearing, and contended that she had received ineffective assistance of counsel throughout the dependency proceedings. (74 Cal.App.4th at pp. 205-207.)

After a careful discussion of *Meranda P.* and *Cathina W.*, the court in *Janee J.* concluded that the waiver rule, as described in *Meranda P.*, does not constitute an absolute bar to “ineffective assistance, right to counsel, or other claims tardily presented on a [section 366].26 appeal.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.) The *Janee J.* court stated: “[T]his is the crux of *Meranda P.*: the waiver rule will be enforced *unless due process forbids it.*” (74 Cal.App.4th at p. 208, italics added.)

The court in *Janee J.* proposed the following guidelines regarding relaxation of this rule: “First, there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole. Lack of notice of rule 39.1B rights was one such example in *Cathina W.* Second, to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere ‘reversible error’ of that sort would abrogate the review scheme (§§ 366.26, subd. (I), 395) and turn the question of waiver into a review on the merits.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at pp. 208-209.) Applying these guidelines, the court in *Janee J.* examined the mother’s purported errors, and concluded that none rose to a “defect that fundamentally undermined the statutory scheme,” thereby excusing them from the waiver rule. (*Id.* at pp. 209-214.)

### *C. Application to the Present Case*

Following *Janee J.*, we examine Manuel’s contentions regarding the now final prior rulings to assess whether they fall outside the waiver rule. For the purposes of our analysis, the rulings in question fall into three pertinent time periods: (1) the

August 10, 1993, order placing Linda in a permanent plan of long-term foster care with Augustina; (2) the orders at the subsequent review hearings under section 366.3, up until the hearing in May 1995, when the juvenile court issued an order transporting Manuel from prison, but he did not appear at the hearing; and (3) the orders at the hearings following May 1995.

As we explain below, the errors cited regarding the third period avoid the waiver rule, and require reversal of the order terminating Manuel's parental rights.

### 1. *August 10, 1993 Order*

With respect to this order, Manuel contends that DCFS failed to give his appointed counsel -- Frumes or Blume<sup>3</sup> -- notice of the August 10, 1993, hearing (§§ 366.21, subd. (b), 366.23, subd. (d), 366.25, subd. (b)), and neither Frumes nor Blume appeared at this hearing, despite the absence of an order anywhere in the record relieving them of their duty to represent him.

In our view, these purported errors do not constitute a “defect that fundamentally undermined the statutory scheme . . . .” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 209.) The record indicates that Manuel has *never* disagreed with the placement of Linda in long-term foster care with Augustina. At an earlier hearing in August 1992, Manuel appeared and was represented by Frumes. Manuel then agreed with the DCFS recommendation that Richard and Jessica should be placed in long-term foster care with Augustina. He was sent notice of the August 10, 1993 hearing, but declined to attend and voice any objection to a similar permanent plan for Linda. Subsequently, he appeared at the section 366.26 hearing in May 2001, and indicated that his *sole* objections concerned Augustina's denial of

---

<sup>3</sup> We do not resolve whether Frumes or Blume was Manuel's appointed counsel during the pertinent periods.

visitation and the loss of his rights to visitation under the proposed permanent plan of adoption.

Accordingly, the waiver rule precludes Manuel from challenging the August 10, 1993 order.

## *2. Review Hearings Up to May 1995*

During the pertinent period, Manuel contends that DCFS failed to give him notice of several review hearings, and his appointed counsel never attended any of these hearings.

Because the only evidence regarding prejudice to Manuel from these and the other purported errors concerns the denial of visitation, we focus the remainder of our analysis on this matter. Although the juvenile court did not expressly repeat its prior orders granting Manuel monitored visitation with the children when it placed them in long-term foster care with Augustina, the DCFS recommendations upon which it acted included continued visitation by Manuel.

Again, we do not discern any defect during this period sufficiently grave to avoid the waiver rule. We recognize that Manuel was entitled to notice of the review hearings following the placement of the children in long-term foster care (§ 366.3), that he was entitled to raise issues about visitation at these hearings (*In re Kelly D.* (2000) 82 Cal.App.4th 433, 436-439), and that his appointed counsel failed to attend the hearings.

Nonetheless, a DCFS report in November 1994 indicates that Augustina was then permitting him to visit the children. Furthermore, he was sent notice of a hearing in May 1995 and was ordered transported from his place of incarceration, but he apparently declined to attend. Like the mother in *Meranda P.*, he thus squandered an opportunity to raise any concerns about visitation in May 1995.

Accordingly, the waiver rule precludes Manuel from challenging the rulings at the review hearing up to and including the hearing in May 1995.

### *3. Hearings Following May 1995*

We cannot reach the same conclusion about the rulings in the third period. During this period, Manuel was denied notice of review hearings when Augustina purportedly halted his visits with the children. After DCFS sent Manuel notice of a review hearing in November 1995, it did not try to give him notice in any way of any subsequent hearings for *three years*, that is, until November 1998. There is no indication of actual notice, written notice sent to any address for Manuel known to the DCFS, or constructive notice.<sup>4</sup> However, according to Manuel's letter to the juvenile court, Augustina began denying him visitation with the children in 1997, during this three-year gap.

Furthermore, when Manuel was apparently released from prison in 1997, DCFS lost track of his whereabouts, and it apparently did not try to find him until October 1998, shortly before it recommended that his parental rights should be terminated. Thereafter, DCFS made only irregular attempts to give Manuel notice. He was not given notice of the May 1999 hearing at which the juvenile court set a hearing under section 366.26, or informed of his right to challenge the setting of this hearing under rule 39.1B.

This lack of notice, together with the absence of representation, prejudiced Manuel's opportunity to challenge the termination of his parental rights. Here, the juvenile court expressly determined that the exception to such a termination in

---

<sup>4</sup> At a minimum, notice of review hearings may be mailed to the parent at his or her last known address until a hearing is set under section 366.26 for the termination of parental rights. (§ 366.21. subd. (b).)

section 366.26, subdivision (c)(1)(A), did not apply to Manuel. Under this subdivision, when the juvenile court finds that the minor is likely to be adopted and that reunification services will not be offered, the juvenile court must terminate parental rights *unless* it finds that “[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(A).) Moreover, it is the parent’s burden to show that these exceptional circumstances apply. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.)

The defects in notice and representation at issue here deprived Manuel of any opportunity accorded him under the dependency statutes to carry his burden regarding this exception. That Manuel was not -- to use his words -- “in touch” with the dependency proceedings during the period in which Augustina purportedly denied him visitation cannot properly be attributed solely to Manuel.

We conclude that these errors in notice, coupled with the lack of representation, rise to a “defect that fundamentally undermined the statutory scheme,” and therefore fall outside the waiver rule. (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 209.) Furthermore, these errors render void the rulings at the review hearings in the third period during which Manuel received no notice (solely to the extent that they concern Manuel’s visitation), and compel the reversal of the order setting the section 366.26 hearing, as well as the order terminating his parental rights and freeing the children for adoption. (74 Cal.App.4th at pp. 208-209; see *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110 [reversal is mandated when social services agency fails to make any effort to give mother notice of hearing].)

Finally, following reversal of these orders, the juvenile court should conduct an inquiry into whether Augustina denied Manuel visitation with the children. If Manuel’s visitation rights were denied, then the juvenile court must accord him

an opportunity to exercise these rights before acting upon DCFS's adoption recommendation; if not, the juvenile court may determine whether to set a section 366.26 hearing on this recommendation.

#### 4. *DCFS's Contentions*

DCFS contends that Manuel may not properly challenge the orders made during the third period because he did not (1) present the errors regarding notice and representation to the juvenile court at the section 366.26 hearing, and (2) identify the orders in his notice of appeal. We are not persuaded.

Regarding (1), Manuel and his counsel indicated at the section 366.26 hearing that he had not been "in touch" with the court, that there were factual concerns about the adequacy of representation, and that he opposed termination of his parental rights. Notwithstanding the inexplicable lack of preparation and forceful argument by Kimball -- who had been appointed to represent Manuel four months earlier -- Manuel's and Kimball's remarks were sufficient to preserve issues regarding notice and representation. We therefore decline to conclude that Manuel's conduct at the section 366.26 hearing waived the errors in question. (See *In re B. G.*, *supra*, 11 Cal.3d at p. 689.)

Regarding (2), we recognize separately appealable orders must generally "be expressly specified -- in either a single notice of appeal or multiple notices of appeal -- in order to be reviewable on appeal." (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43, quoting Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1998) ¶ 3:119.1, p. 3-34 (rev. #1, 1997), italics omitted.) However, "a prior nonappealable order or ruling need not be specified in the notice of appeal from a subsequent appealable judgment or order." (Eisenberg et al., *supra*, ¶ 3:119., p. 3-41 (rev. #1, 2001), italics omitted.)

Here, Manuel's notice of appeal refers solely to the order terminating his parental rights at the section 366.26 hearing. Because the prior order setting this hearing is not separately appealable (*In re Cathina W.*, *supra*, 68 Cal.App.4th at pp. 718-719), the sole issue is whether we may properly examine the errors Manuel has asserted regarding the remaining orders from the review hearings in the third period, which are separately appealable (§ 395).

Manuel's challenge to these orders in this appeal is collateral, rather than direct. As Witkin explains: "An appeal from a judgment or appealable order is a direct attack on that judgment or order, and an appeal from a final judgment is a means of reviewing, by direct attack, intermediate nonappealable orders. . . . But where prior orders are independently appealable and become final by lapse of time, an attack on them in an appeal from the judgment or from some later order is *collateral*." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 10, p. 517, italics added.)

Generally, "'a judgment, though final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, and perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud. [Citations.]'" (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239-1240, quoting 7 Witkin, Cal. Procedure (4th ed 1997) Judgment, § 286, p. 828.) As the court explained in *Rochin*, such an order "is subject to collateral attack at any time." (67 Cal.App.4th at p. 1239.) Thus, the court in *Rochin*, in resolving the issues presented in an appeal, examined an order from a related but different action and determined that it was void, even though the appellant had *never* filed a notice of appeal from the order. (*Id.* at pp. 1239-1240.)

The crux of the holding in *Janee J.* is that the waiver rule will be enforced to bar collateral attacks on prior, final orders “unless due process forbids it.” (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.) As we have explained (see pt. C.3., *ante*), the grave errors in the third period preclude the application of the waiver rule. Under the principles stated in *Rochin*, we may properly evaluate Manuel’s collateral attack on the pertinent review hearing orders, despite the absence of a reference to these orders in his notice of appeal.

### **DISPOSITION**

The orders of the juvenile court setting the section 366.26 hearing and terminating his parental rights are reversed, and the matter is remanded with directions to the juvenile court to vacate these orders; to determine whether Augustina has denied Manuel his visitation rights; and if so, to permit Manuel an adequate opportunity to exercise these rights before ruling on DCFS’s recommendations regarding adoption.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.